No. 48779-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAMES V. KAVE AND HOLLY M. KAVE,
individually and the marital community thereof,
Appellants
v.
McINTOSH RIDGE PRIMARY ROAD ASSOCIATION,
a Washington State Corporation,
Respondent

APPELLANTS' OPENING BRIEF

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COMES NOW Appellants, James V. Kave and Holly M. Kave, by and through their attorney, Kelly DeLaat-Maher of Smith Alling P.S., and submits Appellant's Brief on appeal as follows:

I. ASSIGNMENTS OF ERROR

1. The trial court erred in quieting title to the trail easement in its current location.

2. The trial court erred in refusing to grant summary judgment to the Kaves on the Association's claims under RCW 4.24.630 and allowing those claims to proceed to trial.

3. The trial court erred in granting the Association's Motion in Limine preventing the Kaves from presenting waste damages relating to the cost of restoring the wetland on their property.

4. The trial court erred in failing to instruct the jury as to the applicable statute of limitations on the Association's claims for conversion and damages under RCW 4.24.630.

5. The trial court erred in instructing the jury as to the definition of "waste" in Jury Instruction No. 7.

6. The trial court erred in instructing the jury as to the application of RCW 4.24.630 in Jury Instruction Nos. 6 and 8.

7. The trial court erred in instructing the jury as to nuisance in Jury Instruction Nos. 10 and 11.

8. The trial court erred when it entered judgment for attorney's fees and treble damages in the Association's favor under RCW 4.24.630.

9. The trial court erred in failing to properly calculate attorney's fees, if fees are warranted.

II. ISSUES PRESENTED

1. The court erred in quieting title to the trail easement in a different location than its legal description under a quiet title theory when an easement cannot be unilaterally moved by one party to the easement. (Assignment of Error No. 1).

2. The trial court erred in refusing to reconsider the partial summary judgment quieting title to the trail easement when partial summary judgment orders are interlocutory in nature and the Kaves presented evidence demonstrating a genuine issue of material fact that the trail easement location differed greatly from its legal description and that it was relocated against the wishes of the servient estate. (Assignment of Error No. 1).

3. The trial court erred in refusing to grant summary judgment to the Kaves with respect to the Association's claims under RCW 4.24.630(1) for injury or waste to property in which the Association had

an interest, when the Kaves never went on to the land of another, as required by the statute. (Assignment of Error No. 2).

4. The trial court erred in refusing to allow the Kaves to present consultant costs to the jury representing damages for restoration of the wetland on their property under RCW 4.24.630. (Assignment of Error No. 3).

5. The trial court erred in failing to instruct the jury as to the applicable statute of limitations on the Association's claims for conversion and damages under RCW 4.24.630(1), and advising the jury as to its decision regarding the picnic tables on the Kaves' motion to dismiss those claims after the Association rested its case. (Assignment of Error No. 4).

6. The trial court erred in instructing the jury as to the applicability of RCW 4.24.630 when the Kaves did not go onto the land of another to commit waste or cause injury to property. (Assignment of Error 5 and 6).

7. The trial court erred in instructing the jury as to nuisance when forest practices cannot be considered a nuisance pursuant to statute. (Assignment of Error No. 7)

8. Did the trial court's errors with regard to summary judgment decisions, motions in limine and jury instructions constitute

cumulative error that deprived the Kaves of their right to a fair trial? (Assignments of Error 1, 2, 3, 4, 5, 6, 7 and 8).

9. The trial court erred in failing to properly calculate the amount of fees recoverable for claims in which fees are authorized by statute or contract, and deducting fees for claims for which fees are not authorized. (Assignment of Error 9).

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

The Kaves are the owners of real property located at 8300 Wapiti Lane SE in Tenino, WA, consisting of Lots 12 and 18A. CP 54. The Kaves have owned the property since 2004. *Id.* The property is located within the Respondent McIntosh Ridge Primary Road Association (the "Association"), which is an association of McIntosh Ridge landowners authorized to manage the common areas of the Association. CP 201; Ex 19. McIntosh Ridge was developed in 1999 by the Weyerhaeuser Real Estate Development Co., originally consisting of 25 lots. CP 201; Ex. 19.

Lots within McIntosh are subject to a Declaration of Easements, Covenants and Restrictions of McIntosh Ridge Road Association, recorded under Thurston County Auditor's No. 3317460 on October 15, 2000 ("EC&Rs"). Ex. 19. In 2001, Weyerhaeuser recorded an Assignment of Rights and First Amendment to the Declaration of

Easements, Covenants and Restrictions under Thurston County Auditor's No. 3401402 on December 26, 2001 ("First Amendment"). Ex. 54. The First Amendment to the CC&R's established a Community Recreational Easement legally burdening the Kaves' property on Lot 12. CP 17. The Community Recreational Easement is legally described as follows:

> A 100 FOOT RADIUS CIRCLE EASEMENT, BEING A PORTION OF LOT 11 AND LOT 12 OF SURVEY RECORDED AUGUST 25, 2000 UNDER AUDITOR'S FILE NO. 3309770, RECORDS OF THURSTON COUNTY, WASHINGTON, LOCATED IN THE SOUTHEAST QUARTER, SECTION 11, TOWNSHIP 16 NORTH, RANGE 1 WEST, WILLAMETTE MERIDIAN, THE CENTER OF SAIF 100 FOOT RADIUS EASEMENT BEING DESCRIBED AS FOLLOWS:
>
> COMMENCING AT INTERSECTION NUMBER 14 AS SHOWN ON SAID SURVEY; THENCE NORTH 34°59'03" EAST, 196.17 FEET TO THE CENTER OF SAID CIRCLE.

CP 17; Ex. 54. The Community Recreation Area Easement is described as a "[n]on-exclusive easement for the use of the community property for general community uses including, but not limited to, parking, recreating and picnicking. . ." Ex. 54. Within the Community Recreational Easement burdening the Kaves' property, three (3) roads form a triangle, the site of which became the subject of dispute between the Kaves and the Association.

Sometime prior to the Kaves' purchase, Weyerhaeuser constructed a picnic shelter, log benches, hitching posts, picnic tables, a log perimeter, a fire pit, and a flag pole, as well as a storage shed, all of which were

located on Lot 12. CP 42; CP 202. The picnic shelter itself was located outside of the radius of the Community Recreation Easement. Only the flag pole and shed were entirely within the Community Recreation Are Easement. CP 202.

On December 6, 2002, Weyerhaeuser recorded a Second Amendment to the EC&Rs, under Thurston County Auditor's No. 3484160 ("Second Amendment"). Ex. 55. The Second Amendment created an additional Trail Easement burdening the Kaves' Lot 12. The Trail Easement was legally described as 10 feet wide. *Id.* However, the map for the easement depicts the easement as 50 feet wide. *Id.* Over a period of several years, the Kaves alleged that the Association altered the physical location of the trail easement without their permission, gradually shifting it to a location outside of the legal description of its express easement. The Association claimed that to the extent the trail may have followed a different path on the ground than as legally described, they were entitled to an implied easement. CP 1489.

The Association subsequently claimed that in 2005, someone removed the wooden picnic tables and wooden benches from the Community Recreation Easement. CP 203; CP 2144. VRP 82:12-25; 83:1-2. They claim that one of the picnic tables was later seen on the Kaves' property. *Id.* The Association further claimed that Mr. Kave

knocked over the hitching posts in 2008, and that in 2009 he demolished the log benches and perimeter log barrier, and set fire to the materials on site. CP 43. They finally claim he demolished the picnic shelter in October 2010. *Id.*

In October 2012, the Association performed work within the triangle formed by the three roads within the Community Recreation Area Easement burdening the Kaves' property. CP 55. The triangle area, in which a wetland was located, was described as densely vegetated; difficult to walk through, uneven and overgrown with red alder, red cedar and salmonberry. CP 294. The work consisted of removing trees from a wetland and wetland buffers located within that area, digging a ditch to drain the wetland, placing a culvert to remove water. *Id.*

The Kaves hired Soundview Consultants ("Soundview") in March 2013 to conduct a wetland assessment to determine whether the work done by the Association was in compliance with federal, state and local environmental regulations. CP 98-148. Soundview indicated that wetland violations had occurred as a result of the Association's actions. *Id.*, CP 101; CP 310-368; CP 980-982.

B. PROCEDURAL BACKGROUND.

The wetland violations confirmed by Soundview were the impetus in the Kaves' action against the Association for restoration of the wetland,

which resulted in the filing of a Complaint on August 23, 2013. CP 16-34. The Complaint included several claims, but relevant to this appeal are Plaintiffs' claims for damages and expert fees under RCW 4.24.630 arising from activity in the wetland inside the Community Recreation Area Easement. The claims also consisted of damages associated with removal of trees under RCW 4.24.630 and RCW 64.12.030. *Id.*

On September 17, 2013, the Association filed an Answer, Affirmative Defenses and Counterclaim, alleging claims for implied easement; damages under RCW 4.24.630; conversion, breach of EC&Rs; nuisance; and unjust enrichment. CP 36-41. The Association was represented by defense counsel from the firm of Wilson Smith Cochran Dickerson for defense of the Kaves claims, and by the firm of Bean, Gentry, Wheeler & Peternell, PLLC for prosecution of its counterclaims.

In October 2013, the Kaves filed a Motion for Preliminary Injunction in order to prevent the Association "from further violating the requirements of having a mitigation and performance standards plan, obtaining appropriate permits, and from engaging in activities in the easement until the Defendant has gone through the proper permitting procedures and complied with the Department of Ecology and the U.S. Army Corps of Engineers' requirements." CP 149-154; CP 152.

However, for a number of circumstances, the motion was not heard at that time.

In March 2014, the Association moved for partial summary judgment seeking dismissal of claims under RCW 4.24.630 and RCW 64.12 arising from the Association's removal of timber from the Kaves' property. CP 257-256. The court entered an Order granting the Association's motion as to all claims arising prior to 2010 under RCW 64.12.030 and RCW 4.24.630, but denying its motion as to all claims which arose within the three years preceding the date the Complaint was filed. CP 587-590.

The Kaves re-filed their Motion for Preliminary Injunction in August 2014. CP 591-592; CP 595-704. At the same time, the Association filed its second Motion for Summary Judgment, asking for dismissal of the remaining timber trespass claim under RCW 4.24.630 and RCW 64.12.030, along with various state and federal claims, as well as dismissal of the Kaves claims under the EC&Rs. CP 710-727. Neither motion was heard until January 2015. In support of Plaintiffs' Motion for Preliminary Injunction, Jim Carsner of Soundview submitted declaration testimony outlining the two-year history of his involvement with the wetland on the Kaves' property, and the efforts taken in order to gain compliance by the Association, which did not occur until November

2014, more than a year after the Kaves filed suit. CP 978-1061. Indeed, Mr. Carsner concluded as follows:

> The Defendant still needs to provide a clear record of the plants currently placed in the wetland and it needs to be determined how many new plants need to be added to restore the wetland area that was recently fenced on November 4, 2014. An appropriate monitoring program that includes annual monitoring reports and is undertaken by a wetland specialist will also need to be provided.

CP 986. In response, the Association claimed that the request for injunctive relief was moot, since they had completed the restoration plan as of November 2014, although they admitted that the area was still subject to a monitoring period. CP 1089-190.

Following argument, the court issued a decision on January 9, 2015 on the Defendants' second Motion for Summary Judgment, as well as Plaintiffs' claims for preliminary injunction. CP 1175-1211. The court's decision was reduced to a written order entered February 13, 2015. CP 1255-1261. Therein, the court granted Defendants' motion in part, dismissing any remaining claims under the timber trespass statute, but leaving Plaintiffs' claims under RCW 4.24.630 for waste. The court further dismissed Plaintiffs' private causes of action under various federal and state statutes; and Plaintiffs' claims under Sections 3.1(B), 3.2, 4.1, 6.2, 6.4, 6.18 and 6.23 of the EC&Rs. The court denied summary judgment as to Plaintiffs' claims arising under Section 6.19 of the EC&Rs.

The court denied Plaintiffs' Motion for Preliminary Injunction as being moot or premature. Finally, the court outlined the remaining issues for trial as the following:

1. The Kaves claims arising under the EC&Rs Articles 2.1(c), 6.10, 6.21.2, 6.19 and 8.12;
2. The Kaves claims for waste arising under RCW 4.24.630; and
3. All of the Association's counterclaims.

CP 1259.

In September 2015, the Association filed a third Motion for Summary Judgment, asking for dismissal of the Kaves' claims for waste damages, as well as their claims for violation of the EC&Rs. CP 1500-1515. Concurrently, the Association filed another Motion for Summary Judgment, asking for judgment as to its counterclaims against the Kaves. CP 1475-1499. With respect to the recreational easement as well as the trail easement, the Association requested that the court grant an implied easement to the areas outside of the express easement granted by the developer and utilized by the Association. CP 1486-1490. The Kaves filed a Cross-Motion for Summary Judgment, requesting dismissal of the Association's counterclaims. CP 1552-1659-1666.

The court denied Plaintiffs' Motion for Summary Judgment after hearing on October 2, 2015. CP 1908-1909. As to the Association's motion requesting dismissal of the Kaves' claims for waste damages and

claims under the EC&Rs, the court granted the Defendants' motion with the exception of $522.00 in alleged timber removal, and reserving the issues of liability under RCW 4.24.630 for consulting and attorney's fees. CP 1911-1914. Finally, as to the Association's Motion for Summary Judgment on its counterclaims, the court denied the motion with respect to the Association's claim for implied easement, but granted quiet title as to the location of the trail easement. CP 1916. The court characterized the differences between the express easement and the easement as being utilized as "slight." CP 2122. The court determined that the recreation easement would not be enlarged to include the areas where the amenities had been located, but determined that the recreation amenities were not for the Kaves to dispose of, as they were "mistakenly placed" outside of the recreational easement and belonged to the Defendants. CP 1916-1917. Finally, the court denied the Defendants' motion as to RCW 4.24.630, conversion, and unjust enrichment. CP 1917.

The Kaves subsequently filed a Motion for Reconsideration, in part as to the court's decision on the trail easement. CP 1941-1945. In support of their motion, the Kaves submitted the Declaration of Bruce Studeman, a surveyor who prepared a trail survey depicting the actual location of the trail easement versus its location pursuant to its legal description. CP 1946-1947. The survey, which had not been previously disclosed to the

Kaves through discovery[1], showed that the trail is almost entirely outside of the easement area, in some portions by almost 40 feet. CP 1947; 1993. The court denied Kaves' motion for reconsideration by Order dated December 4, 2015. CP 1997.

The Association filed Motions in Limine through its insurance defense counsel in January 2016. CP 2016-2030. The Association filed a Supplemental Motion in Limine on January 15, 2016, asking for the court to exclude reference, inference, use or evidence relating to the Kaves consultant's fees, attorney's fees and costs incurred in pursuing their waste claims. CP 2129-2134. In response, the Kaves argued that they should be able to present evidence with respect to the wetland consulting fees they incurred in the action under RCW 4.24.630, arising from the Association's actions in filling, draining and damaging the wetland. CP 2221-2228. Although the court previously determined that the request for injunctive relief was moot because the wetland had been brought into compliance, the court had preserved the Kaves' claims for consulting and attorney's fees in its Order of October 2, 2015. CP 1911-1914.

In its Order on the Association's Motions in Limine entered January 22, 2016, the court invited further briefing on why the wetland costs are available when the remaining wetland claims had been

[1] CP 1974-1991

dismissed. CP2248. Both parties submitted briefing in response to the court's request. CP 2278-2283; and CP 2285-2289. Subsequently, the court entered an Order on January 25, 2016 prior to the commencement of trial denying the Kaves their ability to recover their consultant's fees and attorney's fees expended in bringing the wetland into compliance. CP 2290-2291. Thus, at the time trial started, the only issues remaining for trial were the Association's claims against the Kaves.

Following trial, the jury executed a Special Verdict Form. The jury determined that the Kaves had wrongfully injured personal property or improvements on land where the Association had an easement, and awarded $12,500.00 in the amount of damages. CP 2540. They awarded $1,000.00 for conversion, but did not find that the Kaves had been unjustly enriched. CP 2541. They also found that the Kaves had committed waste or injury to land in which the Association had an easement, awarding $1,000.00 in damages. CP 2542. With respect to the Association's nuisance claims, the Association was awarded $9,500.00. CP 2543. The jury also found that the Kaves breached the EC&Rs, but there is no reference to which provisions they violated, nor were they assigned a damage amount for those violations. CP 2543. Finally, the jury did not grant the Association an implied easement expanding the boundaries of the Community Recreation Easement. *Id.*

The Association as Counterclaimant subsequently moved for treble damages and attorney's fees under RCW 4.24.630. CP 2570-2580. The Association as Defendants also moved separately through defense counsel for fees under the EC&Rs, RCW 4.24.630, and RCW 64.12.020 for defeating the Kaves' claims under those statutes. CP 2768-2782. The Kaves requested attorney's fees as well for pursuit of the claims associated with bringing the wetland into compliance. CP 3005-3009; CP 2916-3004. The court denied the Kaves request for fees via Order dated March 4, 2016. CP 3079-3081. The court granted the Association its fees and costs as Counterclaimant in the amount of $237,134.45. CP 3082-3087. In addition to the $9,500.00 awarded by the jury for nuisance, the court also trebled $13,500.00 in damages awarded to the Association for the Kaves action in "wrongfully [damaging] property and [causing] waste on land where McIntosh has an easement." CP 3085. Similarly, the court granted the Association $68,751.00 in fees and $79.50 in costs to the Association for defense of claims brought by the Kaves. CP 3088-3091.

The Kaves filed a motion for a new trial on March 18, 2016 based upon alleged errors in application of the law. CP 3105-3106; CP 3097-3104. The Kaves argued in part that the verdict on nuisance was contrary to law and on the EC&Rs, that the statute of limitations barred the Association's claims, and that the court had misapplied RCW 4.24.630.

The court denied the Kaves' motion via Order dated March 25, 2016. This appeal followed.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Each assignment of error presents a question of law subject to de novo review. *City of Seattle v. State Dep't of Labor & Indus.*, 136 Wn.2d 693, 697, 965 P.2d 619 (1998)("[a]ll questions of law are reviewed de novo").

B. THE TRIAL COURT ERRED IN QUIETING TITLE TO THE TRAIL EASEMENT IN ITS CURRENT LOCATION IN THE SUMMARY JUDGMENT ORDER OF NOVEMBER 6, 2015.

(i) Standard of Review.

On review of an Order for Summary Judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

On an appeal, the appellate court must engage in the same inquiry as the trial court, ". . . construing the facts and reasonable inferences

therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact." *Dumont v. City of Seattle*, 148 Wn.App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellested v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716 (1993)).

(ii) The Trial Court Erred in Quieting Title to the Trail Easement.

In its oral ruling on October 2, 2015, the trial court reasoned the Association failed to demonstrate it acquired an implied easement over the Kaves' property. CP 2116-2117; *see also* CP 2057:16-17 ("Defendant's Motion is denied with respect to the claim(s) of implied easement. This issue remains for trial."). Indeed, the court declined to grant summary judgment with respect to an implied easement on either the community easement or the trail easement. CP 1916. Instead, with respect to the trail, the trial court stated as follows:

> And finally, with respect to the quiet titling to the trail easements, I will grant summary judgment to the defendants on that. I have been given no authority that would convince me that a slight difference in the express trail easement to what is actually being utilized would support anything other than judgment in favor of the defendants on that point.

CP 2121, lines 24-25; 2122, lines 1-5.

By way of its ruling, the trial court purported to quiet title to the current location of the trail easement in favor of the Association. Thus, the trial court, in effect, modified the location of the express easement using its inherent equitable powers. *See* CP 2116:10-14 (trial court explaining defendants argued "there is either an implied easement or some sort of equitable quiet title tool through which this court can bump the confines of the express easement").

However, Washington courts have determined that an easement cannot be relocated without the consent of all interested parties. *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn.App. 188, 199, 45 P.3d 570 (2002); *Crisp v. VanLaeken*, 130 Wn.App. 320, 122 P.3d 926 (2005); *see also Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 854, 351 P.2d 520 (1960) ("We agree with the defendants that the consent of all interested parties is prerequisite to the relocation of an easement.").

In a case addressing the issue, Division I of the Court of Appeals examined whether the court could relocate an easement implied by prior use. *MacMeekin* at 199. Examining other jurisdictions addressing the issue, the court stated that "[t]he majority of courts that have addressed the issue have held that they lack the equitable authority to order relocation of an easement, even if the change is necessary to one estate and would not inconvenience the other." *Id.* Accordingly, the court concluded that an

easement, however created, is a property right, and as such is not subject to relocation absent the consent of both parties. *MacMeekin* at 207.

The *MacMeekin* decision was confirmed in the subsequent case of *Crisp v. VanLaeken*, 130 Wn. App. 320, 122 P.3d 926 (2005). There, the Crisps sought to sell property to a third party for development. *Crisp*, 130 Wn. App. at 322. After the neighboring VanLaeken's refused to modify the location of an easement needed for development, the Crisps "filed an action seeking a court order relocating the easement." *Id.* Relying on *MacMeekin*, 111 Wn. App. at 190, the court rejected overtures to adopt the "minority view" to allow modification by the servient estate owner. *Id.* at 324-25. Adopting the analysis of the *MacMeekin* court, the *Crisp* court reiterated the "traditional approach," followed in Washington, which favors "uniformity, stability, predictability and property rights." *Id.* at 325 (quoting *MacMeekin*, 111 Wn. App. at 205). Accordingly, the *Crisp* court rejected invitation to judicially modify the existing easement:

> Here, the warranty deed unambiguously created an easement burdening lot 67. The Crisps argue only that they want to build a home on their lot and, therefore, this court should grant them the right to relocate the VanLaekens' easement. We decline to do so.
>
> *Judicial relocation of established easements, such as the one at issue here, would introduce uncertainty in real estate transactions.* The Restatement's version of the relevant rule could invite endless litigation between property owners as to whether a servient estate owner may

> relocate an existing easement without a dominant estate owner's consent.

Crisp, 130 Wn. App. at 325-26 (emphasis added).

As expressed in *MacMeekin*, *supra*, and *Crisp*, *supra*, parties may relocate an easement only through express agreement between the parties. Relevant here, the *MacMeekin* court expressed approval with out of state authority which holds courts "lack the equitable authority to order relocation of an easement." *MacMeekin*, 111 Wn. App. at 207. Accordingly, as a matter of law, the trial court below could not rely upon equitable principals to alter the easement location here.

Equity notwithstanding, as a matter of law, courts cannot unilaterally modify or alter an easement at the behest of a single party. The authority cited above clearly enunciates all parties must consent to any relocation of an easement. Here, the Association failed to produce any evidence of agreement between these parties to alter the trail easement. Thus, as in *Crisp* and *MacMeekin*, *supra*, this Court should likewise again reject a unilateral attempt relocate an easement.

Moreover, the Association cannot effectively distinguish *MacMeekin* and *Crisp* by alleging the dominant tenement here seeks to modify the location of the easement. The analysis iterated by the aforementioned courts primarily seeks to preserve "uniformity, stability,

predictability and property rights." *Crisp*, 130 Wn. App. at 325. This predictability and stability prevents the "endless litigation" contemplated by the *Crisp* court. *Id.* at 325. Thus, the iterated "uniformity, stability, and predictability" analysis should apply equally to both the dominant tenement as well as the servient tenement. A dominant tenement may not unilaterally encroach upon the land of the servient tenement absent agreement of the parties.

Because the servient estate holder did not agree to relocate the trail easement, the court's decision on summary judgment quieting title to the trail easement in its current location was in error. The Kaves respectfully request that this Court remand that issue to the trial court with instruction that the trail be utilized in the location contained within its legal description.

C. THE COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS' CLAIMS FOR DAMAGES UNDER RCW 4.24.630.

Plaintiffs' Motion for Summary Judgment heard on October 2, 2015 requested that Defendants' counterclaims under RCW 4.24.630 be dismissed, which the court denied in its oral ruling and in the Order entered November 6, 2015. CP 1915-1918. The court erred in denying

the Kaves' motion as RCW 4.24.630 is inapplicable to the Kaves' actions since all activity took place on the Kaves' property.

> RCW 4.24.630(1) provides in pertinent part as follows:
>
> **Every person who goes *onto* the land of another** and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. . . .

(emphasis added). In *Clipse v. Michels Pipeline Const.*, Inc., 154 Wn. App. 573, 577-78, 225 P.3d 492, 494 (2010), the court outlined the types of conduct for which liability under the statute is imposed. "The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. *Id. at 577-578* "By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. **Presence on the land is required for all three.**" *Id.* at 578 (emphasis added).

Below, the trial court's decision necessarily recognized some ownership interest by the Association over the Kaves' real property. This ruling regarding the actual location of the Association's real property ownership rights drove the application of the trial court's analysis of RCW 4.24.630 and application to the trail easement and Community Recreation Easement. CP 2118:4-2119:8. In its oral ruling with respect to the Community Recreation Easement, the trial court correctly ruled, "The express easement will not be enlarged." CP 2119:2. And the trial court further found:

> There is no question of fact, it appears to me, that these amenities were placed, at least some of them, incorrectly. They were not within the expressed easement.

CP 2116:6-7. However, the trial court departed from settled law by finding "some sort of equitable quiet title tool" to determine the Kaves went "onto the land of another," when those amenities were removed. CP 2116:12; *See* RCW 4.24.630(1) (requisite element of trespass requires entry "onto the land of another").

By departing from settled law, the trial court erred in its application of RCW 4.24.630. As a matter of law, the trial court could not find the "amenities were placed" outside "the expressed easement" but that the Kaves nevertheless went "onto the land of another." CP 2116:6-7; RCW 4.24.630. Indeed, the trial court's reasoning make it clear that no

material issues of fact existed that the Kaves did not go onto the land of another in order to remove the amenities that were not placed within the easement. The trial court erred in its decision to deny summary judgment in favor of the Kaves with respect to the Association's claims under RCW 4.24.630.

D. THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS THE OPPORTUNITY TO PRESENT THEIR CLAIMS FOR FEES UNDER RCW 4.24.630 INCURRED IN OBTAINING RESTORATION OF THE WETLAND ON PLAINTIFFS' PROPERTY.

Pursuant to an Order on Motions in Limine on January 22, 2016 and confirmed at the start of trial by Order dated January 25, 2016, the court determined that the Kaves could not present claims for damages relating to the cost of restoring their property from the Association's wetland incursion, and specifically could not present evidence with respect to its consultant's fees under RCW 4.24.630. Those issues were preserved pursuant to the court's Order on Summary Judgment entered on October 2, 2015 which specifically stated that "Issues of potential liability for consulting and attorney's fees remain." CP 1911-1914.

The appellate court reviews a trial court's grant of a motion in limine for an abuse of discretion. *Medcalf v. Dep't of Licensing*, 83 Wn.App. 8, 16, 920 P.2d 228 (1996) aff'd, 133 Wash.2d 290, 944 P.2d 1014 (1997). The decision preventing the Kaves from presenting their

consultant's fees as the costs of restoration of their property under RCW 4.24.630 was an abuse of discretion. The case should be remanded for presentation of those damages representing the Kaves' cost of restoration.

RCW 4.24.630 calculates damages, for claims pursuant to statute as follows:

> Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

In *Colwell v. Etzell*, the Colwells filed an action against Etzell to quiet title to an easement across Etzell's land. *Colwell v. Etzell*, 119 Wn. App. 432, 435, 81 P.3d 895, 896 (2003). The *Colwell* court reversed damages pursuant to RCW 4.24.630 in favor of the Colwells because Etzells merely maintained the easement and did not enter the land of another. *Id.* at 439-40. Because the *Colwell* court held in favor of Etzell, the court then reversed the award of fees to the Colwells pursuant to RCW 4.24.630. *Id.* at 442. The Colwell court explained:

> *RCW 4.24.630 requires a showing of wrongful (intentional and unreasonable) conduct resulting in some dollar amount of damages. Standing Rock,* 106 Wash.App. at 244-45, 23 P.3d 520. *In other words, without a showing of damages the claim has no value.*

> Here, the trial court based the award of attorney fees and costs on its interpretation of RCW 4.24.630 and *Standing Rock.* As analyzed above, the Colwells failed to show the requisite wrongful conduct-intentional and unreasonable invasion upon another's land committing acts of waste or injury. After summary judgment was granted quieting title of the easement in the Colwells, Mr. Etzell removed the culverts he had placed in the road and reconstructed a new gravel road in that same location at his own expense. *The Colwells claim no damages.*

Colwell, 119 Wn. App. at 442 (emphasis added).

On its face, *Colwell, supra,* does not address the proper measure of damages. Instead, *Colwell, supra*, merely reflects the claimant must demonstrate some "dollar amount of damages." *Colwell, supra*, does not preclude recovery of consultant's fees paid here representing the costs expended by the Kaves in restoring the wetland within the Community Recreation Easement.

Here, RCW 4.24.630(1) suggests a broad reading of damages. The statute uses expansive language in determining damage calculation: damages "include, but are not limited to..." This supports the Kaves argument that consultant's fees incurred in bringing the wetland into compliance fall within the definition of "damages" and the cost of restoration. The trial court's decision granting the Association's Motion in Limine preventing the Kaves from bringing evidence of their costs was in error, as well as the court's decision in its Motion in Limine that the Kaves

remaining claims were dismissed as a matter of law – especially in light of the October 2, 2015 Order that specifically recognized that those issues were to remain, while also ruling that there was no "monetary property damage or injury to the land from Plaintiff's waste claim." CP 1911-1914. The Kaves respectfully request remand and a new trial in order to be able to present their damages associated with restoration of the wetland damaged by the Association.

E. THE STATUTE OF LIMITATIONS BARS SEVERAL OF DEFENDANTS' CLAIMS FOR DAMAGES.

Defendants' claims for conversion and under RCW 4.24.630 are subject to a three year statute of limitations. See RCW 4.16.080; and *Skokomish Indian Tribe v. U.S.*, 410 F.3d 506 (2005). Either actual or constructive knowledge commences the three-year period.

The Washington Supreme Court emphasizes the exercise of due diligence by the injured party in the case of *In re Estates of Hibbard*, 118 Wn.2d 737, 746-47, 826 P.2d 690 (1992). That court recognized the "practical and policy considerations underlying statutes of limitations," observing "that stale claims may be spurious and generally rely on untrustworthy evidence." *Id.* at 745. The court went on to state that "[s]ociety benefits when it can be assured that a time comes when one is

freed from the threat of litigation." *Id.* "[C]ompelling one to answer a stale claim is in itself a substantial wrong."

In this case, the Defendants asserted claims for conversion and damages under RCW 4.24.630 for association "amenities" originally placed by the developer, Weyerheuser. These amenities included a picnic shelter, log benches, hitching posts, picnic tables, a log perimeter, a fire pit, a recreation/utility shed and a flag pole. CP 259; 2143-2144.

Defendants' trial brief claimed that the wooden picnic tables and benches were removed in 2005, with a picnic table later observed on the Kaves' property. CP 2144. VRP 82:12-25; 83:1-2. In addition, they state the hitching posts were pushed down and the recreation shed was vandalized in 2008. *Id.* In 2009, they stated the log benches and perimeter log barrier were demolished and burnt, and the fire pit destroyed. CP 2144-2145. Only the picnic shed remained in October, 2010. VRP 84:16-25; 85:1-5.

Based upon the briefing and the testimony of Sarah Schroeder at trial, the only amenity within the three-year statute of limitations before Defendants filed their counterclaims was the picnic shelter. The court erred in failing to instruct the jury as to the appropriate statute of limitations. Any award representing replacement costs of items other than the picnic shelter are not recoverable. Ms. Schroeder testified that the cost

to replace the picnic shelter was $9,500.00. VRP 98-99. The jury awarded $12,500.00 for damage to personal property or improvements to real estate or on land where McIntosh had an easement, and an additional $1,000.00 for conversion, as well as another $1,000.00 for waste. Those amounts should be reduced to only compensation for the replacement of the picnic shelter, as claims for any other amenity are outside of the statute of limitations.

The Plaintiffs brought a Motion to Dismiss Counterclaims for conversion and injury to personal property under CR 41(c) and CR 50 at the conclusion of the Defendants' case. VRP 185-193. The court denied that motion with the exception of the picnic tables. VRP 194:10-17. Denial of that motion was an error. Further, it is not apparent that the jury was ever instructed that the picnic tables were not an item of damages that could be awarded in its verdict. Indeed, it is evident that they did include the damages including the picnic tables, since Ms. Schroeder testified that that the total cost to replace all the amenities, not including foundational support, was $12,000.00. VRP 98:17-25; 99:1-2. As such, the case should be remanded with instructions for a new trial as to the amount of damages, as well as instruction as to proper application of the statute of limitation limiting the Association's claims to amenities that were

removed within three years prior to the filing of the Association's counterclaims.

F. THE JURY WAS IMPROPERLY INSTRUCTED WITH RESPECT TO NUISANCE.

Jury Instruction No. 10 defines nuisance under RCW 7.48.120. Forestry practice is exempt from application of RCW 7.48.120. The jury was not instructed that forestry practices are protected from application of the nuisance statute. As such, the Kaves respectfully request that this court remand with instructions for a new trial on the issue of nuisance.

The Court of Appeals review jury instructions de novo. If an instruction contains an erroneous statement of the applicable law that prejudices a party, it is reversible error. *Thompson v. King Feed & Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Id.* Even if an instruction is misleading, it will not be reversed unless prejudice is shown. Error is prejudicial if it affects or presumptively affects the outcome of trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

RCW 7.48.120, upon which Jury Instruction No. 10 was based, provides as follows:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

However, the legislature specifically found that forestry practices are often unfairly subjected to nuisance lawsuits, and therefore enacted RCW 7.48.300-310 to protect forest practices from nuisance lawsuits. That statute provides as follows:

> The legislature finds that agricultural activities conducted on farmland and forest practices in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses and timber production. It is therefore the purpose of RCW 7.48.300 through 7.48.310 and 7.48.905 to provide that agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits.

RCW 7.48.300.

Pursuant to RCW 7.48.305, agricultural activities and forest practices are presumed reasonable and not a nuisance. That statute provides in pertinent part as follows:

> (1) Notwithstanding any other provision of this chapter, agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.
>
> (2) Agricultural activities and forest practices undertaken in conformity with all applicable laws and rules are presumed to be good agricultural and forest practices not adversely affecting the public health and safety for purposes of this section and RCW 7.48.300. An agricultural activity that is in conformity with such laws and rules shall not be restricted as to the hours of the day or day or days of the week during which it may be conducted.
>
> (3) The act of owning land upon which a growing crop of trees is located, even if the tree growth is being managed passively and even if the owner does not indicate the land's status as a working forest, is considered to be a forest practice occurring on the land if the crop of trees is located on land that is capable of supporting a merchantable stand of timber that is not being actively used for a use that is incompatible with timber growing. If the growing of trees has been established prior to surrounding nonforestry activities, then the act of tree growth is considered a necessary part of any other subsequent stages of forest practices necessary to bring a crop of trees from its planting to final harvest and is included in the provisions of this section.

RCW 7.28.305.

The McIntosh Ridge EC&Rs specifically contemplate that the properties within the Association would be used for timber harvesting. Ex. 19, Section 6.18. As such, presumably timber harvesting activities

could not be considered a violation of the EC&Rs. Ms. Schroeder testified that the nuisance complained of consisted of the presence of the excavator, as well as stacked wood and debris from logging activities. VRP 110:18-24. Here, the Kaves presented testimony though Paul Graves that their property was subject to a forest management plan prepared by Mr. Graves, and that they were in compliance with that plan. VRP 211-218. The Kaves use of their property, including the presence of an excavator on the property, was within the definition of a forest practice. The jury should have been instructed that a forest practice was protected from a nuisance suit under RCW 7.48.305.

G. THE COURT ERRED IN ITS APPLICATION OF RCW 4.24.630(1).

(i) The Jury Was Improperly Instructed As to Application of RCW 4.24.630.

Jury Instruction No. 6 simply recited the provisions of RCW 4.24.630(1). CP 2552. Jury Instruction No. 7 defined waste as "an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate which results in substantial injury to the real estate. CP 2553. Jury Instruction No. 8, in turn, outlined the Association's counterclaims that the Kaves wrongfully damaged or removed personal property and improvements from a community recreation area; that the Kaves wrongfully caused waste or injury to the community trail; and that

the burden of proof is on the Association to show that the Kaves wrongfully damaged or caused waste to property. CP 2554. The jury was not instructed that application of the statute was improper if the Kaves' actions took place on their own land, nor were they instructed as to what was meant by "wrongful."

Here, the jury should not have been instructed with respect to RCW 4.24.630, as it is not by law applicable to the Kaves' actions. Its consistent misapplication against the Kaves throughout the case is clearly prejudicial, and warrants remand and a new trial. The Kaves respectfully request that this Court remand with instructions for a new trial.

RCW 4.24.630(1) provides as follows:

> **Every person who goes onto the land of another** and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(emphasis added). In *Clipse v. Michels Pipeline Const.*, Inc., 154 Wn. App. 573, 577-78, 225 P.3d 492, 494 (2010), the court outlined the types of conduct for which liability under the statute is imposed. "The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. *Id. at 577-578* "By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. **Presence on the land is required for all three.**" *Id.* at 578 (emphasis added).

The court in *Clipse* further reviewed the required *wrongful* elements under RCW 4.24.630(1). "By RCW 4.24.630's plain terms, a claimant must show that the defendant 'wrongfully' caused waste or injury to land, and a defendant acts 'wrongfully' only if he or she acts 'intentionally.'" *Id.* at 580. "A person acts 'wrongfully' if he or she intentionally and unreasonably commits an act while knowing or having reason to know that he or she lacks authority to so act." *Id.* at 579-80. Mr. Kave testified that the amenities were on his property, outside of the Community Recreation Easement. VRP 328:8-12, 333:21-22. He further testified that he was granted authority to remove the shelter since it was on his own land. VRP 330:22-25; 33-334; 335:1-8. As such, Mr. Kave's

actions were not wrongful in that they were not intentional and unreasonable while knowing he lacked authority to act.

Further, the evidence is consistent, and has never been disputed, that the Kaves' actions, at all times, took place on their own property, only portions over which the Association had an easement. The Kaves never went on to the land of another in order to remove any amenities. It is also evident that the amenities were not even placed within the express easement granted to the Association, which furthers the Kaves' arguments that they could not, by law, have violated RCW 4.24.630. An instruction to the jury that implies that an easement allows for application of the statue is prejudicial, misleading, and warrants a remand for a new trial.

(ii) Since the Kaves did not go onto the land of another to remove amenities, treble damages and fees under RCW 4.24.630(1) are not warranted.

Following trial, the Association as Counterclaimant filed a motion for an award of treble damages and attorney's fees based upon application of RCW 4.24.630. Based upon the Association's request, the court awarded treble damages and attorney's fees specifically under RCW 4.24.630(1). The standard of review of an award of attorney's fees is abuse of discretion. *In re Recall of Pearsall–Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998). The court abused its discretion in granting an award

of fees under RCW 4.24.630(1) in favor of the Association for removal of Association amenities from the area surrounding the community easement.

Very few published cases have been decided interpreting the statute in relation to an easement. *Standing Rock Homeowner's Assoc. v. Misich*, 106 Wn.App. 231 (2001), and *Colwell v. Etzell*, 119 Wn.App. 432 (2003), are the only two published cases dealing with this issue. Both are instructive in determining that fees should not be awarded under RCW 4.24.630(1).

In *Standing Rock*, the court awarded attorney's fees to the Association for the defendant's actions in coming onto land other than his own to remove gates, which the court deemed were reasonable restrictions on use of the easement. *Standing Rock,* at 247. Interestingly, the gates the defendant removed were not located on either the defendant's property, or even on the servient estate. *Id.* The court specifically determined that the Plaintiff in that case was entitled to damages under RCW 4.24.630(1) as follows:

> Although the Standing Rock gate was situated on the land of a non-party, Mr. Pearson, the gate was installed, maintained, and replaced repeatedly at Standing Rock's expense. Therefore, Standing Rock was an injured party under RCW 4.24.630(1). Accordingly, the trial court did not err in finding Mr. Misich liable as a joint tortfeasor under RCW 4.24.630(1).

Id. at 247. Thus, based upon the damages associated with replacing the personal property of the gates on numerous occasions, the court awarded attorney's fees under RCW 4.24.630(1) as well.

The situation presented here is diametrically opposed to that of *Standing Rock.* Most importantly, the Kaves at no time trespassed onto the land of any other person, nor was there any testimony alleging that they went onto Association owned property or the property of any other Association member to commit waste or injury to land or personal property. Assuming the Association is entitled to damages associated with reconstruction of its picnic shelter, the facts are very clear that the shelter was in fact located entirely on the Kaves' land, even ***outside of the recreation area easement.*** Simply put, the facts presented here do not comport with the requirements under RCW 4.24.630 that require a physical trespass onto the land of another to do damage.

By contrast, the court in *Colwell* overturned an award of attorney's fees under RCW 4.24.630(1) when it determined there was no wrongful invasion or physical trespass upon another's property when the defendant's actions were solely on his own property, and were also deemed unintentional. *Colwell v. Etzell,* 119 Wn.App. 432, 81 P.3d 895 (2003). In that case, Mr. Etzell, the owner of the servient estate, ditched and positioned five culverts along the easement road in an effort to repair

drainage issues on the property, after which Mr. Colwell claimed he was not able to use the easement. *Id* at 435-436.

In initially awarding fees to Colwell, the trial court relied upon the decision in *Standing Rock* to determine that it was not so much an entry upon or trespass on land of another that was the important factor, but rather the wrongful invasion of a property interest of another in that land that triggered a violation of RCW 4.24.630(1), and, therefore, an award of fees. *Id.*at 438. The appellate court, upon examination of the *Standing Rock* decision, disagreed:

> While recognizing factual differences between *Standing Rock* and the present case, the trial court dismissed these differences as immaterial. We do not agree. In *Standing Rock,* the plaintiff, an association of property owners in a Chelan County development, had placed a number of gates on an easement passing through its property, as well as on the land of an adjoining nonparty, to deter trespass and vandalism. *Id.* at 236, 23 P.3d 520. The holder of the easement repeatedly entered onto the Standing Rock land and destroyed the gates. *Id.* at 242, 23 P.3d 520. The court held that the gates were reasonable burdens on the easement and that the defendant holder of the easement was liable for all the damages caused by his actions.
>
> In the current case, the trial court reasoned that *Standing Rock* "supports the idea that it is not so much the 'trespass' or '*entry upon* the *land* of another,' but the (wrongful) invasion of a right *in* land that is protected by RCW 4.24.630." CP at 72. The trial court's analysis was supported by its determination that the decision in *Standing Rock* did not turn upon the entry upon the land of another, but instead "upon the wrongful invasion of the real property interest held by the plaintiffs [Standing Rock] in

> not having the easement leading to *their* [whose?] property overburdened, which easement happened to be located on others' land." CP at 72 (emphasis added). A careful reading of the facts in *Standing Rock* refutes this reasoning. The easement was not leading to Standing Rock's property; it was located on Standing Rock's property and not located on another's land. The defendant wrongfully invaded Standing Rock's property (trespass) and repeatedly destroyed Standing Rock's gates on the easement he held, because he felt the gates were overburdening the easement leading to his land. **The statute's premise is that the defendant physically trespasses on the plaintiff's land. There was no physical trespass in the present case.**

Id. at 438-39 (emphasis added).

In his concurrence, Justice Sweeney agreed that fees were not awardable under RCW 4.24.630. He stated as follows: "The plain language of the statute requires a trespass ("[e]very person who goes onto the land of another"). RCW 4.24.630(1)." *Id.* at 444. He further agreed with how the majority distinguished *Standing Rock.* "There, we applied RCW 4.24.630 where the easement holder entered onto the servient estate (the land of another) and removed gates (personal property). Here, the owner of the servient estate was on his own land." *Id.*

Thus, in the event that the case is not remanded for trial based upon prejudicial jury instructions, this Court should reverse the award of treble damages and attorney's fees in the Counterclaimant's favor under RCW 4.24.630. No evidence was presented at trial or at any time prior that the Kaves' actions took place on land other than their own, as the

amenities at issue and, particularly the picnic shelter, were located outside of the easement. Indeed, even if the amenities were located entirely within the easement, the Kaves' actions still took place on their own property, as the Association only has an interest in the property but the Kaves, as the servient estate owners, are still on their own land.

H. THE ASSOCIATION AS COUNTERCLAIMANT IS NOT ENTITLED TO FEES UNDER SECTION 8.10 OF THE EC&RS.

In its motion for fees and treble damages, the Association argued that even if the court determines that the Association is not entitled to an award of treble damages and fees and costs under RCW 4.24.630(1), it is still entitled to its fees under the EC&Rs, and specifically section 8.10 of that document. Ex. 19; CP 2570-2580. The Association, as Counterclaim Defendants, reads that section too broadly, and fees should not be affirmed on that basis. It provides as follows:

> 8.10 **Enforcement.** If the Board of Directors of the Association, or their successors or assigns shall violate or attempt to violate any of the easements, covenants or restrictions herein, it shall be lawful for any other person or persons owning a Lot to prosecute any proceedings at law or in equity against the Association to prevent it from doing so or to recover damages and costs for such violation, including, without limitation, reasonable attorney's fees.

In Washington, absent a contract, statute, or recognized ground of equity, attorney's fees will not be awarded as part of the costs of litigation.

City of Seattle v. McCready, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). Whether a particular contractual provision authorizes an award of attorney's fees as costs is a legal question. *Tradewell Grp., Inc. v. Mavis*, 71 Wn.App. 120, 126, 857 P.2d 1053 (1993).

Section 8.10 of the McIntosh Ridge Association is unlike a more general traditional covenant enforcement section whereby the prevailing party in an action to enforce covenants is entitled to attorney's fees. By way of example, the attorney's provision in *Riss v. Angel* 131 Wn.2d 612, 934 P.2d 669 (1997) provided that "[i]f any of the lot owners ... shall violate or attempt to violate any of the provisions of these restrictive mutual easements" it shall be lawful for "any other person or persons owning real property" in the Mercia subdivision or the "Mercia Corporation" to sue to enforce the covenants. *Id.* at 633. The court in that case allowed attorney's fees against various members of the unincorporated association for their actions in rejecting the Riss building plans. Similarly, the court in *Wimberly v. Caravello*, 136 Wn.App. 327, 149 P.3d 402 (2006) awarded attorney's fees to the prevailing party pursuant to a provision that provided that "a person in an action to enforce the covenants is entitled to reasonable fees." *Id.* at 341.

By contrast, the court did not allow an award of attorney's fees in *Saunders v. Meyers*, 175 Wn.App. 427, 306 P.3d 978 (2013). In that case,

the Saunders sued the Meyers for breach of covenant and injunctive relief based upon a tree height covenant. *Saunders* at 434. The court strictly construed the attorney's fees provision. It reasoned as follows:

> CCR ¶ 1 permits homeowners to sue other homeowners for violating the restrictive covenants. CCR ¶ 1 provides: "All costs incurred in enforcement shall be at the expense of the violator or violators." (Emphasis added.) Conversely, CCR ¶ 18 states:
>
> > In the event of litigation arising out of enforcement of these restrictive covenant[s] ... the grantee or grantees so involved, shall be liable for the payment of all attorney fees court costs and/or other expense or loss incurred by Evergreen Land Developers, Inc., in enforcing these restrictive covenants.
>
> (Emphasis added.) CCR ¶ 18 extends attorney fees to Evergreen's successors, as well.
>
> The Somerset covenants clearly distinguish between attorney fees and costs. They award attorney fees only to Evergreen and its successors, while limiting homeowners to costs. This makes sense, because it protects the developer from costly litigation with nonconforming homeowners. Here, homeowners sought to enforce the covenants, not Evergreen or its successor.
>
> Because the covenant distinguishes between attorney fees and costs, there is no basis to award attorney fees as part of the costs of litigation.

Id. at 445-446.

Here, the attorney's fees provision allows for fees in the event that the Board of the Association, or their successors or assigns violates the

easements, covenants or restrictions, a lot owner can proceed at law or in equity against the Association and recover damages and costs for violation, including attorney's fees. While this provision may operate to allow fees against the Kaves for the Association's defeat of the Kaves' claims, the plain language of the provision does not operate to allow fees to the Association in its efforts to sue a lot owner for violation of the EC&Rs.

I. THE COURT ERRED IN FAILING TO DEDUCT FEES FOR UNPRODUCTIVE CLAIMS.

The award further encompassed all fees incurred by the Association as Counterclaimant, without any deduction for fees incurred on other aspects of the case that do not support an award of damages. Assuming that fees are warranted to the Counterclaimant, which the Kaves assert they are not, the award must be remanded to the court for a proper determination of fees.

A trial court may "determine fees and costs using the 'lodestar' calculation, multiplying the total number of hours reasonably expended in the litigation by the reasonable hourly rate." *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012) (Emphasis Added). The number of hours reasonably expended is an objective test and may be adjusted downward if the number of hours appears unreasonable or

duplicative. "The novelty and complexity of the issues are factors to consider in determining the reasonableness of the hours expended in the litigation." *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999). While Washington recognizes multiple methods to determine an appropriate award of attorney's fees, "ultimately, the fee award must be reasonable in relation to the results obtained." *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958, (2001) (emphasis added).

When attorney's fees are available on some claims but not others, or for some but not all of the work performed by the attorney, the trial court must take care to segregate the attorney's compensable hours from the non-compensable hours. *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54 P.3d 665(2002). In a case involving multiple claims, the court should award attorney's fees only on the claims for which attorney's fees are authorized. If the plaintiff recovers on some claims for which attorney's fees are authorized and on some claims for which attorney's fees are not authorized, the court should limit the award accordingly. *King Co. v. Squire Inc. Co.,* 59 Wn.App. 888, 801 P.2d 1022 (1990).

Here, the Association argued that all of its fees were warranted under RCW 4.24.630, or alternatively, under the EC&Rs. However, this is an overstatement. First, as outlined exhaustively above, fees are not warranted under RCW 4.24.630, as the Kaves never went onto the

property of another and their actions were not wrongful based upon their good faith belief that they had authority to remove amenities located outside of the easement. Further, the Association did not prevail on all its claims, such as unjust enrichment or implied easement.

Further, significant fees were incurred by the Association with the Bean Gentry firm, beginning in June 2013 through to November 2014 relating to Association's efforts to bring the wetland into compliance. CP 2622-2716. As stated previously, the Association's wetland incursion served as the catalyst to the suit, and following suit, the Association brought the area into compliance with an approved wetland restoration plan. Fees incurred in bringing the wetland into compliance, incurred either by the Association as Defendants or Counterclaimants, are not recoverable under either the EC&Rs or RCW 4.24.630. The Kaves request that this Court remand for a proper calculation of fees.

J. CUMULATIVE ERROR DENIED THE KAVES OF A FAIR TRIAL.

The cumulative errors in this case justify remand for a new trial. The doctrine of cumulative error recognizes that multiple errors might combine to deny a litigant a fair trial, even where such individual error does not prejudice the litigant in isolation. *Storey v. Storey*, 21 Wn.App. 370, 374, 585 P.2d 183 (1978). The errors in this case resulting in a

snowball misapplication of RCW 4.24.630, resulting in an improper award of treble damages and attorney's fees.

The trial court erred in refusing to grant the Kaves summary judgment on the Association's claims for damages under RCW 4.24.630. This was in error, and resulted in erroneous instructions to the jury on the statute, and a resulting verdict for damages under the statute. Misapplication of the statute continued when damages were then trebled by the court, and an award of the entire amount of attorney's fees incurred by the Association. The award included fees spent on unproductive claims, as well as meetings with wetlands consultants in the Association's efforts to mitigate the damage to the wetlands – the very reason why the Kaves filed the suit. The Kaves were further harmed when they were prevented from testifying as to their own damages arising from the Association's actions in damaging wetlands on property owned by the Kaves and over which the Association has a Community Recreation Easement. The Kaves should have been allowed to present testimony as to those restoration costs and consultant's fees. These errors undermine the Kaves claims and defenses, and denied them the right to a fair trial.

K. THE KAVES ARE ENTITLED TO FEES ON APPEAL.

The Association as Counterclaimant was awarded fees under RCW 4.24.630(1). In the event the case is remanded and reversed, pursuant to RAP 18.1 the Kaves request attorney's fees on appeal.

V. CONCLUSION

Based upon the foregoing, the Kaves respectfully request that this Court reverse the orders challenged and vacate the judgment entered in favor of the Association. The Kaves request a new trial as indicated herein. Additionally, the Kaves request an award of attorney's fees and costs on appeal.

DATED this 31st day of August, 2016.

Respectfully submitted,

SMITH ALLING, P.S.

By _____
Kelly DeLaat-Maher, WSBA #26201
Attorney for Appellants/Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 2016, served a true and correct copy of the foregoing document, upon counsel of record via the methods noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of September, 2016, at Tacoma, Washington.

Amy H. Presley